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The Commonwealth of Massachusetts
Executive Office of Public Safety
Fire Safety Commission
Automatic Sprinkler Appeals Board
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MAURICE M. PILETTE
CHAIRMAN

PAUL DONGA
VICE CHAIR

Docket # 2005-19
826 Plymouth Ave
Fall River, MA.

AUTOMATIC SPRINKLER APPEALS BOARD
DECISION AND ORDER

A) Statutory and Regulatory Framework

This is an administrative appeal held in accordance with Massachusetts General Laws Chapter 30A; Chapter 148, section 26G1/2 and Chapter 6, section 201, relative to a determination of the Fall River Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building operated by Beira Alta Restaurant and owned by Alfred Sarmento (hereinafter referred to as the Appellant). The building, which is the subject of the order, is located at 826 Plymouth Ave, Fall River, MA.

B) Procedural History

By written notice received on March 15, 2005, the Fall River Fire Department issued an Order of Notice to the Appellant informing him about the provisions of a new law, M.G.L c. 148, s.26G1/2, which requires the installation of an adequate system of automatic sprinklers in certain buildings or structures. The building subject to the order is located at 826 Plymouth Ave, Fall River, MA. The Appellant filed an appeal of said order on April 27, 2005. After granting a request for a continuance, the Board held a hearing relative to this appeal on November 9, 2005, at the Department of Fire Services, Stow, Massachusetts.

The Appellant, Alfred Sarmento, appeared along with his attorney, Paul J. Moriarty and David C. McCartney, a code consultant. Deputy Chief William Silvia appeared on behalf of the Fall River Fire Department.

Present for the Board on November 9, 2005 were: Chief Thomas Coulombe, Stephen D. Coan and Edward G. McCann. Peter A. Senopoulos, Esquire, was the Attorney for the Board.

C) Issue(s) to be Decided

Whether the Board should affirm, reverse or modify the enforcement action of the Fall River Fire Department relative to the subject building in accordance with the provisions of M.G.L. c.148, s. 26G1/2?

D) Evidence Received

1. Application for Appeal
2. Written statement in Support of Application for Appeal
3. Order of Fall River Fire Department
4. 1st Notice of hearing to Appellant
5. 1st Notice of hearing to Fall River Fire Department
6. 2nd Notice of hearing to Appellant
7. 2nd Notice of hearing to Fall River Fire Department
8. Documentation Provided by Appellant in Support of Appeal (Exhibits A-D)
9. Summary of Appeal and Floor Plan
10. Photographs (Page A and B)
11. Photographs (A-G)
- 12A Letter from Chief Dawson, dated February 9, 1999
- 12B Letter from Bertrand Goulet, dated February 9, 1999
- 12C Letter from David Macartney dated February 18, 1999

E) Subsidiary Findings of Fact

- 1) By notice dated March 15, 2005, the Fall River Fire Department issued an Order to the Appellant requiring the installation of an adequate system of automatic sprinklers in a building located at 826 Plymouth Ave, Fall River, in accordance with the provisions of M.G.L. c. 148, s.26G. This building is used by an establishment that operates under the name of Beira Alta Restaurant, a private, for profit organization.
- 2) According to the building's Certificate of Inspection, issued by the City of Fall River on December 31, 2004, the establishment has a total capacity of 440 persons on two separate levels. The street level has a listed capacity of 350 persons for the area described as the restaurant and banquet facility. The area characterized as the "basement function room" has a stated capacity of 90 persons. The Certificate of Inspection does not indicate a designated building classification. The restaurant area features a small room or area characterized as a small bar room that customers can patronize for the purchase of liquor and snacks. The bar area has approximately 22 seats and standing room available just behind bar seating. There is no separate capacity listed in the Inspection Certificate for this separate bar area. The separation between the bar and the restaurant/function room consists of a wall and glass paned door. The basement area described by the Appellant as the "meeting/function room" also features a full service, fully stocked bar with several bar chairs.

- 3) The establishment is open everyday, except for Tuesdays. In general, operating hours are 9:30 a.m. through 1 a.m. Meal service typically ends around 10 p.m. The facility provides full liquor service during all hours of operation.
- 4) The appellant contends that the establishment is principally used, advertised and held out as a restaurant and is therefore specifically exempt from the sprinkler provisions of M.G.L. c.148, s.26G1/2. He testified that the establishment provides a full and extensive lunch and dinner menu. The facility is also used approximately 10 to 12 times per year for functions such as weddings, anniversary parties and christening parties. The appellant indicated that during special functions, the restaurant manager is always present.
- 5) The “restaurant area” features a small dance floor and includes a small raised platform designed to provide an area for live entertainment purposes. Entertainment for dancing is provided routinely on Saturday nights and often on Friday nights by an individual performer who uses a synthesizer to play music for patrons for listening and dancing purposes. Usually, the entertainment starts at 9 p.m. Testimony indicated that on nights that feature musical entertainment, customers who eat a meal may remain in the facility and listen or dance to the entertainment until closing time which is 1:00 a.m. Additionally, patrons can visit the bar for bar service without ordering a meal while waiting for the entertainment. Customers can walk between the restaurant area and bar area for the purpose of ordering beverages during all hours of operation, including those hours when live entertainment is provided.
- 6) Deputy Chief Silvia testified that during the course of his review of the facility he witnessed a raised platform stage and several musical instruments on the stage. The appellant refuted that observation, stating that his cousin is the only musical person and only uses a synthesizer. The appellant contends that a meal is the main attraction to customers and that the entertainment is secondary. The appellant indicated that tickets are sold for a comedy-dinner show that appears approximately two times per year.
- 7) Deputy Fire Chief Silvia does not contest the factual description of the premises. He is particularly concerned about the basement area which has no windows and features only one exit. He also testified that the corridor leading from the basement area to the stairs and exit is only 32 inches wide. The exit from the downstairs meeting room leads directly to the restaurant/banquet room and not directly outside. He indicated that the determination to require the sprinklers was based upon the overall building capacity, the existence of liquor sales and entertainment.

F) Ultimate Findings of Fact and Conclusions of Law

- 1) The provisions of the 2d paragraph of M.G.L. c. 148, s. 26G1/2, in pertinent part, states: “every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a night club, dance hall, discotheque, bar, or similar entertainment purposes...(a) which is existing or (b) for which an approved building permit was issued before December 1, 2004, shall be protected throughout with an adequate system of automatic sprinklers in accordance with the state building code”. The law was effective as of November 15, 2004. Under the provisions of the new law (St. 2004, c.304, s.11) an owner is

required to submit plans and specifications for the installation of such sprinklers within 18 months of the effective date of the act (May 15, 2006) and is required to complete the mandated sprinkler installation by November 15, 2007.

- 2) The subject building is considered a public assembly with a capacity of 100 persons or more.
- 3) Based upon the testimony of both parties, this establishment features many characteristics typical of a restaurant since it regularly and routinely serves meals on a daily basis. A building used principally as a restaurant is exempt from the sprinkler requirements of M.G.L. c.148, s.26G1/2 (4th paragraph). However, the appearance of live entertainment for dancing purposes, the existence of a dance floor area combined with the continuous serving of alcoholic beverages to customers until 1:00 a.m., well after food service has terminated indicates that activities also exist in this establishment that are consistent with those typical of a nightclub. Such activities occur on Saturday nights and occasionally also on Friday nights.
- 4) Under the provisions of M.G.L. c.148, s.26G1/2, 4th paragraph, a building used principally as a restaurant may be used as a nightclub, dance hall, discotheque or similar entertainment purposes on a temporary basis without the need to install an adequate system of automatic sprinklers under said section. However, such temporary use is allowed only if a permit is issued for such use by the head of the fire department in consultation with the local building inspector. The issuance of such a permit is a matter within the sole discretion of the head of the fire department who may set the terms and conditions to protect against fire and preserve public safety. There is no definition of “temporary use” as used in M.G.L. c.148, s.26G1/2 relative to the issuance of the temporary permit under said 4th paragraph, accordingly, this Board, in an advisory memorandum dated 1-10-05, indicated that the determination of the term “temporary use” is within the discretion of the head of the fire department. However, this Board indicated that such use should not be considered temporary if it is so used “often, regularly or on a routine basis.”
- 5) The current use of the subject restaurant for nightclub activities, as stated in paragraph F#3, is not considered temporary, since such weekly use is reasonably considered “often, regular or routine.”

G. Decision and Order

Based upon the aforementioned reasoning and the evidence presented at the hearing, the Board unanimously upholds the Order of the Fall River Fire Department to install sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s.26G1/2 and further orders the installation in accordance with statutory timeline:

1. The submission of plans and specifications for the installation of sprinklers within 18 months of the effective date of the act (by May 15, 2006) and
2. Complete installation within 3 years of the effective date of the act (by November 15, 2007).

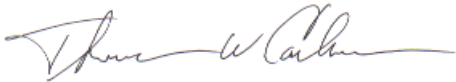
H) Vote of the Board

| | |
|-------------------------------------|----------|
| Thomas Coulombe (Chairperson) | In Favor |
| Stephen D. Coan, State Fire Marshal | In Favor |
| Edward G. McCann | In Favor |

I) Right of Appeal

You are hereby advised that you have the right, pursuant to section 14 of chapter 30A of the General Laws, to appeal this decision, in whole or in part, within thirty (30) days from the date of receipt of this order.

SO ORDERED,



Chief Thomas W. Coulombe
Hearing Chair

Dated: December 5, 2005

A COPY OF THIS DECISION AND ORDER WAS FORWARDED BY 1st CLASS MAIL, POSTAGE PRE-PAID, RETURN RECEIPT REQUESTED, TO: Paul J. Moriarty, Esquire, 22 Washington Street, Norwell, Massachusetts 02061 **and to** Deputy Chief William Silvia, Fall River Fire Department, 140 Commerce Drive, P.O. Box 749, Fall River, Massachusetts 02720.

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Norwell, Massachusetts 02061

Deputy Chief William Silvia
Fall River Fire Department
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